TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. 187

ROBERT JACKSON, PLAINTIFF IN ERROR,

vs.

GEORGE E. EMMONS AND J. PAUL SMITH.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 3, 1909.

(17,137.)

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SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 15, 1899.

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In the Court of Appeals of the District of Columbia

ROBERT JACKSON, Appellant,
vs.
GEORGE E. EMMONS and J. PAUL SMITH. } No. 814.

a Supreme Court of the District of Columbia.

ROBERT JACKSON
v.
GEORGE E. EMMONS and J. PAUL SMITH. } No. 38509. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration and Notice to Plead.*

Filed Aug. 3, 1895.

In the Supreme Court of the District of Columbia, the 3rd Day of August, 1895.

ROBERT JACKSON, Plaintiff,
vs.
GEORGE E. EMMONS and J. PAUL SMITH, Defendants. } At Law. No. 38509.

The plaintiff sues the defendants for that the said defendants, on the 15th day of July, A. D. 1892, and continuing on divers other days and at divers other times between said day and the first day of October, in said year 1892, on ground bordering on 25th street northwest, in the city of Washington, in said District, unlawfully, knowingly, and wantonly blasted and caused to be blasted, by means of gunpowder or other explosive matter, pieces of rock from rocky formations on said ground, and by such blasting unlawfully and forcibly, with great and dangerous violence, threw large and heavy pieces of said rocky formation, from time to time, into the premises on said street, and near said ground occupied and held by said plaintiff under a yearly ground rent, with other rights and privileges, and against the house and habitation on said premises, which house was and is owned by said plaintiff, and was used and

occupied during said period by said plaintiff and his family as a dwelling.

And by reason of such throwing of said pieces the said house was greatly broken and injured, the family of plaintiff terrified and endangered in life and limb, and such house and prem-
2 ises rendered unsafe for man or beast to stay in while such blasting was continued.

And on the 21st day of July, in the year 1892 aforesaid, the said defendants, in continuing said blasting, unlawfully and wantonly and with gross negligence of the safety and rights of said plaintiff and his family and habitation, placed and caused to be placed in said rocky formations an excessive and very dangerous blast, the explosion of which threw with great force a heavy and large piece of rock into said premises of plaintiff, which were on the opposite side of said street from said blasting, and which piece of rock knocked plaintiff's wife down, sever-ly injuring her and rendering one of her arms useless a long time; and on the 6th (sixth) day of August, in the year 1892 aforesaid, the said defendants, in continuing said blasting, unlawfully and wantonly, and while they were personally present and directing said blasting, and with gross and wilful negligence and disregard of the safety of plaintiff's said habitation and family, placed and caused to be placed in said rocky formations an excessive and very dangerous blast, the explosion of which by said defendants' orders threw with great force a heavy and large piece of rock into said premises of plaintiff and against his said habitation, the said piece of rock going clear through the said house of plaintiff, tearing and breaking away the weather-boarding and plastering of the outside walls, jarring and throwing the said house out of position, shattering the glass in the windows, and otherwise greatly injuring the same and putting said plaintiff to great expense to repair such damage, as far as could be repaired, he paying $30 for plastering, $18.21 for lumber, $16 for car-
3 penter's work, besides other expenses plaintiff paid; and other wrongs and trespasses the said defendants then and there, between said 15th July and 1st October, did to the said plaintiff; all of which wrongs herein mentioned were to the great damage of said plaintiff; wherefore he saith he is and was injured and damaged to the value of six thousand dollars, and therefore he brings suit for such, with costs; and the plaintiff claims $6,000 damages, besides costs.

J. J. WATERS,
Attorney for Plaintiff.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

J. J. WATERS,
Att'y for Plaintiff.

4 *Pleas.*

Filed Sep. 14, 1895.

In the Supreme Court of the District of Columbia.

ROBERT JACKSON
vs.
GEORGE E. EMMONS, J. PAUL SMITH. } Law. No. 38509.

1. And now comes the said defendants and for plea say that they are not guilty in manner and form as plaintiff in and by his said declaration hath alleged.

2. And for a further plea said defendants say that the cause of action in said declaration set forth did not accrue within three years before the bringing of this action.

WM. A. McKENNEY,
Attorney for Defendants.

Joinder of Issue.

Filed Sep. 23, 1895.

In the Supreme Court of the District of Columbia, the 23rd Day of September, 1895.

ROBERT JACKSON, Plaintiff,
vs.
GEORGE E. EMMONS and J. PAUL SMITH, Defendants. } No. 38509. At Law, Docket No. 42.

The plaintiff joins issue on the defendants' pleas.

5 J. J. WATERS,
Attorney for Plaintiff.

To Wm. A. McKenney, Esq., attorney for defendants.

Service of copy of above acknowledged this — day of ——, 189–.

——,
Attorney for —.

Supreme Court of the District of Columbia.

WEDNESDAY, *December* 8, 1897.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

ROBERT JACKSON, Plaintiff,
vs.
GEORGE E. EMMONS and J. PAUL SMITH, Defendants. } At Law. No. 38509.

Now comes here as well the plaintiff, by his attorney, J. J. Waters, as the defendants, by their attorney, Wm. F. Mattingly, and a jury

of good and lawful men of this District, to wit, Rob't L. Flynn E. F. Riggs, J. W. Selby, Wm. H. Joice, Beuson Sutton, Jno. F. Speicer, John Donegan, H. M. Armistead, Chas. B. Hough, Wm. Reynolds, John M. Laskey, and Harry C. Given, who, being duly sworn
6 to try the issue above joined, after a partial hearing of the case the plaintiff, by leave of court, withdraws a juror, and the remaining jurors are discharged from further consideration of the case, with leave to amend his declaration as advised within twenty days, and case is continued for the term.

Defendants' Motion that Plaintiff be Required to Pay Their *Costs.*

Filed Dec. 10, 1897.

In the Supreme Court of the District of Columbia.

ROBERT JACKSON
vs.
GEORGE E. EMMONS and J. PAUL SMITH. } Law. No. 38509.

And now come the defendants, by Wm. F. Mattingly, their attorney, and move the court to amend the order herein continuing the case by adding thereto that the plaintiff be, and he is hereby, required to pay to the defendants their costs, to be taxed by the clerk.

WM. F. MATTINGLY,
Attorney for Defendants.

WASHINGTON, D. C., *December 9th*, 1897.

Mr. J. J. Waters, attorney for plaintiff.

DEAR SIR: You will please take notice that I will request
7 action by the court on the motion, of which the above is a copy, on Friday, the 17th inst., at the opening of the court or as soon thereafter as counsel can be heard.

Yours respectfully, WM. F. MATTINGLY,
Att'y for Defendants.

Supreme Court of the District of Columbia.

FRIDAY, *January* 7, 1898.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

ROBERT JACKSON, Plaintiff,
vs.
GEORGE E. EMMONS ET AL., Def'ts. } At Law. No. 38509.

So much of the order heretofore passed herein limiting the plaintiff's time to amend is hereby rescinded; and upon hearing defendants' motion to require the plaintiff to pay costs, it is considered that the plaintiff have leave to amend his declaration as advised within twenty days from this date, and that he pay the costs of the term in which a juror was withdrawn.

8 *Defendants' Motion to Dismiss Suit, &c.*

Filed Mar. 8, 1898.

In the Supreme Court of the District of Columbia.

ROBERT JACKSON
vs.
GEORGE E. EMMONS ET AL. } No. 38509. Law.

And now comes the defendants, by William F. Mattingly, their attorney, and, showing unto the court from the record herein and statement of plaintiff's attorney hereto annexed that the plaintiff has not paid the costs nor amended his declaration herein, *and* move the court to dismiss this suit or to take such other action in the premises as may be lawful and proper.

WM. F. MATTINGLY,
Attorney for Defendants.

Mr. J. J. Waters, Esq., attorney for plaintiff, # 1225 31st St. N. W., city:

You will please take notice that on Friday next, the 11*st* instant, at the opening of circuit court No. 1, or as soon thereafter as counsel can be heard, I will request the action of the court on the motion of which the foregoing is a copy.

WM. F. MATTINGLY,
Attorney for Defendants.

March 8, 1898.

9 Filed Mar. 8, 1898.

1225 31ST STREET, *Jan.* 27, 1898.

Wm. F. Mattingly, Esq., att'y for Mr. Geo. E. Emmons, &c.:

We intended in good faith to change or "amend" our declaration in the case of Jackson *v.* Emmons & Smith, so as to avoid unnecessary appeals, but the "amendment" since made to the leave given us (at your request), compelling us to pay unexpected costs, induces us to elect not to amend now, especially as on further investigation we are confirmed in the opinion that Jackson is the legal owner of the house he complains of as damaged; so please notice that we stand upon our declaration now as originally filed.

Very resp'y yours,
J. J. WATERS,
Att'y for Rob't Jackson.

(On envelope:) Jos. J. Waters, attorney-at-law, 1225 31st street (Georgetown), Washington, D. C. Return if not delivered in five days. (Stamps.)

WILLIAM F. MATTINGLY, Esq., *Att'y-at-law,*
435 *Seventh St. N. W.,*
Washington, D. C.

10 Supreme Court of the District of Columbia.

FRIDAY, *March* 25, 1898.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

ROBERT JACKSON, Plaintiff,
vs.
GEORGE E. EMMONS and J. PAUL SMITH, Def'ts. } At Law. No. 38509.

The plaintiff, though granted leave to amend his declaration on the 7th day of January, 1898, within twenty days, and that he pay the costs of the October term, 1897, has not so amended or paid said costs, and it appearing upon the records that the plaintiff declines to so amend, therefore the defendants move the court to dismiss this suit, which is granted; therefore it is considered that the plaintiff take nothing by his suit, and that the defendants go thereof without day and recover against the plaintiff their costs of defense, to be taxed by the clerk, and have execution thereof. Penalty of bond on appeal fixed at $50.00.

11 *Motion to Vacate Order of Dismissal and Affidavit.*

Filed Mar. 26, 1898.

In the Supreme Court of the District of Columbia, Holding Circuit Court Term No. 1, This 26 March, 1898.

ROBERT JACKSON, Plaintiff,
vs.
GEORGE E. EMMONS and J. PAUL SMITH, Defendants. } No. 38509 At Law.

The plaintiff hereby moves said court to vacate the order dismissing his above-designated suit, made the 25th March, 1898, and to restore said case to the trial calendar of said court for trial, and for reasons therefor assigns the following:

1. Because plaintiff had a right to elect not to amend his declaration according to leave granted in said case, especially as the defendants had said court to burden said plaintiff with their costs after he had elected to amend, and as plaintiff's declaration was good, his testimony at the trial in this suit consistent with said declaration, and the election to amend his declaration so as to suit the rulings of the court on the evidence given at said trial was made simply to avoid multiplying appeals.

2. Because the court erred in dismissing plaintiff's case on such a motion as that made by defendants in this suit for that purpose.

3. Because plaintiff's counsel was absent at the hearing of said motion of defendants, as he had not been informed that the
12 day for hearing such motion had been latterly fixed for 25th March, 1898, although before fixed for 26th March, 1898, as

defendants' counsel knew plaintiff's counsel so understood when he attended court to answer said motion on 12th March, 1898; and plaintiff refers to his declaration filed herein, the motions of defendants as to costs on amendment and to dismiss plaintiff's case, the minute entries as to jury trial and as to allowances to plaintiff to amend, and the affidavit attached hereto as parts hereof and in support thereof.

J. J. WATERS,
Att'y for Robert Jackson, Plaintiff.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before the subscriber, clerk of the supreme court of the District aforesaid, Joseph J. Waters, who, being duly sworn, deposes and says:

"I am counsel for plaintiff in the case of Jackson *v.* Emmons, above stated, and know more of the proceedings in court than my client, who is an illiterate man, and when defendants' counsel and affiant attended court on account of defendants' motion to dismiss plaintiff's case, on 12th March, 1898, they were informed by said court that certain motions, including defendants', would be heard that day two weeks from then, and this affiant so told defendants' counsel, and affiant did not know that the day was changed to a day earlier until after plaintiff's case was dismissed in his absence, so that he was not heard thereon.

"The declaration of plaintiff in such case was never demurred to, but at the trial by jury of the case on 8th Dec., 1897, Robert
13 Jackson, being duly sworn as his own witness, testified that he was the plaintiff in the case, and that the lot where his house was, which hou e was the subject of complaint, belongs to Mr. Elias Travers; to which defendants' counsel objected on ground that title to land could not be proved that way, but plaintiff's counsel said he was not going to prove title to land, but to a house. Then witness continued and said Mr. Travers let him have the lot on an agreement, made in or about 1869, not in writing, that he, Jackson, should pay twelve dollars a year for it, and that when he had paid five hundred dollars he, Mr. Travers, would give him a deed for it, and that he had paid all his rent from then until the end of 1897.

"That the house on the said land belonged to him, Jackson, and that he put it there by consent of Mr. Travers, and that it cost him $300 or $400, as he had receipted bills to show.

"To this evidence about the house defendants' counsel at once objected on ground that it contradicted plaintiff's declaration, as the house in law belonged, as part of the lot, to the owner of the ground, Mr. Travers; which objection Mr. Justice Cole, holding said court for such trial, sustained and ruled out plaintiff's said evidence and informed plaintiff's counsel that, as the testimony contradicted his declaration, he could not go on with the trial.

"Thereupon affiant, wishing to avoid several appeals and considering that the objection went only to part of his case, asked leave to amend his declaration so as to drop the question of ownership of the house and to claim more definitely for the injuries to the lawful occupation of it by plaintiff, and to this request no objection was made nor any demand for any costs set up by defendants; so such leave was granted.

14 "Afterwards, before plaintiff's time to amend had expired, defendants moved to compel him to pay costs of the past term, being $19.70, as given by the clerk of the court, as a condition of amending, and affiant wished time to see if his client could comply with this when required by the court, so as to avoid controversy, but, finding his client could not comply in time, as said client is very poor and a colored laborer, and that it was not necessary to his case to amend, affiant elected not to do so, and to avoid misunderstanding so informed defendants' counsel by the letter he exhibits with his motion to dismiss."

J. J. WATERS.

Sworn to and subscribed before me this 26th day of March, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

15 Supreme Court of the District of Columbia.

WEDNESDAY, *March* 30, 1898.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

ROBERT JACKSON, Pl'ff,
vs.
GEORGE E. EMMONS ET AL., Def'ts. } At Law. No. 38509.

Upon hearing the motion of plaintiff to vacate and set aside the judgment entered herein on the 25th day of March, 1898, it is considered that said motion be, and the same hereby is, overruled. Penalty of bond for costs on appeal is fixed at $50.00.

16 *Order for Appeal and Citation.*

Filed Apr. 13, 1898.

In the Supreme Court of the District of Columbia, the 13th Day of April, 1898.

ROBERT JACKSON, Plaintiff,
vs.
GEORGE E. EMMONS and J. PAUL SMITH, Defendants. } At Law. No. 38509.

The clerk of said court will please enter an appeal, which is hereby taken by said plaintiff, to the Court of Appeals of said District from the order and judgment in above case on 25th March, 1898, dis-

missing plaintiff's suit with costs, and from the order on 30th March, 1898, in same case, refusing plaintiff's motion to vacate said previous order and judgment.

Also please issue citation to said defendants to appear in said Court of Appeals — to said appeal.

JOSEPH J. WATERS,
Attorney for Plaintiff and Appellant.

17 In the Supreme Court of the District of Columbia.

ROBERT JACKSON
vs.
GEORGE E. EMMONS and J. PAUL SMITH. } At Law. No. 38509.

The President of the United States to George E. Emmons and J. Paul Smith, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 13th day of April, 1898, wherein Robert Jackson is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 14 day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 14th day of April, 1898.

WM. F. MATTINGLY,
Attorney for Appellees.

18 *Memorandum.*

Appeal bond filed April 15, 1898.

Order for Transcript of Record for Appeal.

Filed May 13, 1898.

In the Supreme Court of the District of Columbia.

ROBERT JACKSON
vs.
GEO. E. EMMONS and J. PAUL SMITH. } No. 38509. Law.

The clerk of the court will please make up a certified copy of the record in the above case according to the rules of the Court of Appeals, and to consist of the following:

Declaration, filed Aug. 3, 1895.
Pleas, filed Sep. 14, 1895.
Joinder of issue, filed Sep. 23, '95.
Entry in full from Law Min. 37, p. 197, of the impanelling of jury, withdrawal of juror, and leave to amend.
Motion to compel plaintiff to pay costs (omitting notice), filed Dec. 10, '97.
Entry in full from Law Min. 37, p. 250, of order amending order of Dec. 8, '97, in above case extending time to amend and ordering plaintiff to pay costs of term.
Motion to dismiss plaintiff's case, with letter, filed Mar. 8, 1898.
Memoranda of costs in case for Oct. term, 1897 ($19.70).
19 Entry in full from Law Min. 37, p. 385, of order dismissing case, with judgment for defendants.
Motion to vacate order of dismissal, and affidavit, filed 26 March, 1898.
Entry in full of March 30, 1898, Law Min. 37, p. 394, overruling above motion.
Order for appeal in full, filed April 13, 1898.
Memorandum of appeal bond, approved and filed Ap'l 15, '98.
Citation and acknowledgment of service.

J. J. WATERS,
Att'y for Rob't Jackson, Appellant.

20 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 19, inclusive, are true copies of originals in cause No. 38509, at law, wherein Robert Jackson is plaintiff and George E. Emmons *et al.* are defendants, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 21st day of May, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 814. Robert Jackson, appellant, *vs.* George E. Emmons and J. Paul Smith. Court of Appeals, District of Columbia. Filed May 24, 1898. Robert Willett, clerk.

WEDNESDAY, *October 5th, A. D.* 1898.

ROBERT JACKSON, Appellant,
vs.
GEORGE E. EMMONS and J. PAUL SMITH. } No. 814.

The argument in the above-entitled cause was commenced by Mr. J. J. Waters, attorney for the appellant, and was continued by Mr. Wm. F. Mattingly, attorney for the appellees, and was concluded by Mr. J. J. Waters, attorney for the appellant.

ROBERT JACKSON, Appellant,
vs.
GEORGE E. EMMONS and J. PAUL SMITH. } No. 814.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

The appellant, Robert Jackson, instituted a suit at common law in the supreme court of the District of Columbia against the appellees, Emmons and Smith, as defendants, for trespass upon his property. After pleas filed and issue joined, the cause came on for trial before a jury. At the trial the plaintiff, apprehending a verdict against him, asked leave, which was granted by the court, to withdraw a juror, to have the jury discharged from further consideration of the case, and to be allowed to amend his declaration within twenty days; and the cause was thereupon continued for the term. Two days after this the defendants moved for an amendment of the order of the court to the effect that the plaintiff should be required to pay the costs of the term. This amendment the court directed to be made.

Subsequently, on the total failure of the plaintiff either to pay the costs or to amend his declaration within the time limited or at all, the defendants moved the court for a dismissal of the suit. The court granted the motion and dismissed the suit. The plaintiff then moved to vacate the order of dismissal, and with his motion and in support of it filed an affidavit, the pertinency of most of which is not apparent. But the court overruled his motion, and he then appealed from the order of dismissal to this court, as also from the order refusing his motion to vacate the order of dismissal.

There are four assignments of error, which we quote in the language of the appellant's brief:

"The lower court erred in the following instances:

"1st. In ruling that the ownership of plaintiff's house went with the ground, and that he could not therefore verbally prove himself the owner.

"2d. In dismissing plaintiff's suit because he elected not to avail himself of leave to amend his declaration, especially when an *ex post facto* condition was attached against his will.

"3d. In refusing to vacate the order of final dismissal upon motion and proper showing therefor.

"4th. In allowing defendants to set up a claim for costs after leave had been granted plaintiff to amend unconditionally without objection by such defendants."

The first of these assignments is wholly unjustified by the record. The only ground for it is a portion of the affidavit to which we have referred as having been filed by the appellant in support of his motion to vacate the order of dismissal, and wherein irrelevant reference is made to the rulings of the court at the abortive trial before the jury. That trial was a nullity. It resulted in nothing. It is as if it had never been had, and it is wholly improper to bring the rulings then made, and which resulted in nothing, to this court upon the present appeal. This assignment cannot be considered by us.

The other assignments simply seek to raise the question whether the court below had the right to impose costs when and as it did, and to dismiss the plaintiff's suit after he had persistently refused either to amend his declaration or to pay the costs; and we do not see that there is any reasonable ground to doubt the power and the right of the court in the premises. Whether for the failure merely to amend the court should have dismissed the suit, it is unnecessary to determine; although such failure under the circumstances might justify serious censure. The request to withdraw a juror and to discharge the jury because a declaration is found to be imperfect, and the grant of such request upon the condition that the declaration will accordingly be amended, coupled with a subsequent refusal without just cause to make the amendment and the purpose necessarily incident thereto to go to another trial by jury without amendment, might justly be regarded as a juggling with the administration of justice and a fraud upon the rights of other parties, for which a dismissal would be eminently proper, if such course were not pursued, as we believe it was in this case, in good faith. But whether pursued in good faith or in bad faith, it is a practice that cannot be allowed.

But the dismissal of the suit was evidently based, not so much on the refusal to amend as on the refusal to pay costs. The appellant's claim is to the effect that the court, after the discharge of the jury and the grant of leave to amend, had no right to amend the order by requiring him to pay the costs of the term.

But the act of Maryland of 1785, chapter 80, section 4, specifically provides that in such cases such costs shall be allowed as the court shall think just. The law itself imposes the condition that costs shall be paid by the party proposing to amend, and it might well be questioned whether the court could refuse to allow them upon the motion of the party entitled to them. Nor is it apparent why they should not be allowed at any time when demand is made for the allowance. Upon refusal to pay, dismissal of the suit is the proper and perhaps now the only remedy left to the party aggrieved.

We find no merit in the appeal, and the order appealed from will therefore be *affirmed with costs. And it is so ordered.*

TUESDAY, *October* 18*th*, *A. D.* 1898.

ROBERT JACKSON, Appellant,
vs.
GEORGE E. EMMONS and J. PAUL SMITH. } No. 814, October Term, 1898.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the order of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

October 18, 1898.

THURSDAY, *October* 20*th*, *A. D.* 1898.

ROBERT JACKSON, Appellant,
vs.
GEORGE E. EMMONS and J. PAUL SMITH. } No. 814.

On motion of Mr. J. J. Waters, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Robert Jackson, appellant, and George E. Emmons and J. Paul Smith, appellees, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Know all men by these presents that we, Robert Jackson, of Washington city, District of Columbia, as principal, and Dr. James F. R. Appleby, of same place, as surety, are held and firmly bound unto George E. Emmons and J. Paul Smith, of the same city and District, in the full and just sum of three hundred dollars to be paid to the said George E. Emmons and J. Paul Smith or their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between said Robert Jackson, as plaintiff and appellant, and said George E. Emmons and J. Paul Smith, as defendants and appellees, a judgment was rendered against the said Robert Jackson for costs, and the said Robert Jackson having appealed to the Supreme Court of the United States in such suit and having obtained a writ of error thereto and filed a copy thereof in the clerk's office of the said court to reverse the judgment and decision in the aforesaid suit, and a citation directed to the said George E. Emmons and J. Paul Smith, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now the condition of the above obligation is such that if the said Robert Jackson shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ROBERT his x mark. JACKSON. [SEAL.]

J. F. R. APPLEBY. [SEAL.]

Signed, sealed, and delivered in the presence of—

EDITH R. APPLEBY.
J. J. WATERS.

Surety satisfactory.
W. F. MATTINGLY,
For Def'ts in Error.
10, 26, '98.

Approved by—
R. H. ALVEY, *Ch. Justice.*

[Endorsed:] Robert Jackson, appellant, *vs.* George E. Emmons *et al.* Bond on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Oct. 28, 1898. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To George E. Emmons and J. Paul Smith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Robert Jackson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 28th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
Octo. 28th, 1898.
WM. F. MATTINGLY,
For Def'd'ts in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 28, 1898. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 16, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Robert Jackson, appellant, *vs.* George E. Emmons and J. Paul Smith, No. 814, October term, 1898, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 29th day of October, A. D. 1898.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

[Ten-cent U. S. internal-revenue stamp, cancelled 10, 29, '98. R. W.]

Endorsed on cover: Case No. 17,187. District of Columbia Court of Appeals. Term No., 157. Robert Jackson, appellant, *vs.* George E. Emmons and J. Paul Smith. Filed November 5, 1898.

No. 157.

Brf. of Waters for P. C.

Filed Feb. 1, 1900.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 157.

ROBERT JACKSON, PLAINTIFF IN ERROR AND BELOW,

vs.

GEORGE E. EMMONS AND J. PAUL SMITH.

BRIEF FOR JACKSON, PLAINTIFF.

J. J. WATERS,
Attorney for Plaintiff.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

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No. 157.

ROBERT JACKSON, PLAINTIFF IN ERROR AND BELOW,

vs.

GEORGE E. EMMONS AND J. PAUL SMITH.

BRIEF FOR JACKSON, PLAINTIFF.

STATEMENT OF CASE, QUESTIONS, ETC.

Sec. 1. Briefly stated, this is an action for a continued trespass and injuries to the house or habitation and family of plaintiff by the unlawful blasting of rock near. The declaration shows the particulars more fully. Ps. 1 and 2, printed Record. Pleas of not guilty and limitations by defendants were filed, on which issues were joined. P. 3 Record. No demurrer was made by defendants.

Sec. 2. At the trial of the case, plaintiff testified in part that the lot of ground on which his house was belonged to Mr. Elias Travers, to which testimony defendants objected that title to land could not be proved that way, but plaintiff avoided the ill-founded objection by stating he was not going to prove title to land but to a house. Then witness said Travers let him have the lot on an unwritten agreement that he, witness, should pay $12 a year ground rent for it, and that when he had paid $500, he, Travers, would deed it to him.

Witness also testified that the house belonged to him, and that he put it there *by consent of Travers.* These facts appear in the Record through an uncontradicted affidavit for plaintiff, in connection with a motion, on ps. 7 and 8, Rec. To such evidence defendant objected on ground that it contradicted plaintiff's declaration, they claiming the house belonged by law, as part of the lot, to Mr. Travers, and could not by verbal evidence be shown to be Jacksons. This contention was sustained by the trial judge, who informed plaintiff he could not go on with the trial. So plaintiff was not allowed to give any further evidence in support of the other allegations of his declaration, although separate from the title to the house. P. 7, marg. p. 13, Record.

Sec. 3. Thereupon to avoid excepting and appealing, and to get some sort of a fair trial, plaintiff asked leave to amend his declaration, so as to avoid the court's objections, by dropping the allegation of ownership of the house, and by claiming more fully for injuries to the *occupation* of it, and as no objection was made by defendants (the amendment being in their favor), nor any demand for any conditions or costs, such *leave* was granted to amend as plaintiff might be *advised.* With this a juror in the trying panel was withdrawn, and the case continued for the term without further qualification. Ps. 8 and 4 Rec.

Sec. 4. But before plaintiff could amend, in two days after leave, defendant's filed motion to compel the plaintiff to pay all their costs as a *condition* of amending, ps. 4, marg. p. 6, Rec. This was not heard until about a month thereafter, when plaintiff was given the *leave* to amend as he might be *advised* over again, provided he paid certain costs, p. 4, Rec., end. As this was a burden *plaintiff* did not ask for, nor consent to in advance of an election, nor as a lawful requirement at such a stage in the case, it being imposed *after* the trial and leave to amend, and as the amendment was really *not necessary* to plaintiff's case, (he having a legal right to the house in question) he elected

not to amend, and fairly informed defendants thereof. Ps. 5, marg. p. 9, and 8, marg. p. 14, Rec. This induced defendants to move for the dismissal of plaintiff's suit, which was granted. Ps. 5 and 6, Rec.

Sec. 5. This was an entire surprise to the plaintiff's counsel, who did not expect his client to be summarily deprived of all chances of a fair trial for the outrageous treatment he had suffered, because he refused to exercise a leave or license to change his declaration, (which change would have solely suited defendants), when that leave had an after imposed burden attached to it against his will, which he thought by all reason, authority and justice, gave him a right to refuse to exercise such a license. And the judge himself had once conceded such a right of refusal. The attaching of a condition and burden to the leave to amend, not demanded when it was taken, operated as a snare to get plaintiff out of Court, and eventually precipitated plaintiff's case into this Honorable Court on a question of practice, (and before any ascertainment of damages by verdict) as the only resort left to get justice. Had plaintiff known he was to be treated as he was after the leave to amend, he would not have asked such leave, but would have duly excepted to the ill-founded and inconsistent (as we shall show) rulings of the trial judge, and brought his case up for review on such, especially as it would have cost but little on such a diminutive record and bill of exceptions.

If the snare in this case is to be sustained, then the same trap can be always set with success when a party offers to amend. Thus the Courts will create in reality a "juggling with justice" now wrongly charged to us in the opinion of the Court of Appeals in this case, p. 12 Rec., from which we will try to show we have justly appealed, having "just cause" for what we did "in good faith" in refusing to amend.

Sec. 6. As plaintiff's counsel was absent when the mo-

tion to dismiss his case was granted, he filed a motion to vacate the order and judgment of dismissal, and embodied the small amount of testimony at the trial, with some other things, in an affidavit, which was not denied by any contrary affidavit, in support of such motion. Ps. 6 to 8, marg. ps. 11 to 14, Rec. This affidavit was in part to refresh the mind of the Court or Judge, in an authenticated manner, as to what occurred at the trial, as no bill of exceptions in the case could be made for the situation in which plaintiff was unexpectedly placed, and there was no other approved way by plaintiff of showing the facts than by affidavit. But the justice overruled the motion, and plaintiff duly appealed from both the order of dismissal and the order refusing to vacate the same, to our Court of Appeals. Marg. ps. 15 and 16, Rec.

Sec. 7. The preceding shows how the questions following are raised in the case:

a. Can a court dismiss a party's suit because he elects not to amend his declaration, on *leave* to do so as *advised*, when the leave has a *condition* imposed on it against his will *after* the leave is granted, or is such leave a mandatory order?

b. Is a party *compelled* to exercise a *privilege* he has obtained to change his pleading, when the exercise involves compliance with an after-imposed condition which is against his will, and which he did not ask for?

c. Can a party waive a right by his silence to have conditions about amending imposed on his adversary, and then after leave to amend, have the leave clogged with a disadvantageous condition or drawback?

d. Is it correct that the ownership of a house, as separate from the ground under it, cannot be shown by parol evidence?

Our Court of Appeals quickly affirmed the judgment appealed from, in an opinion which cites no authority and which we submit, and shall try to show, is hasty and incon-

sistent, and charges plaintiff with bad faith without reason for the charge. From such we duly sued out a writ of error to this Honorable Court. Ps. 11 to 13 Rec.

ASSIGNMENT OF ERRORS, ETC.

Sec. 8. Our Court of Appeals, we submit, erred in the following instances:

1st. In affirming judgment of Supreme Court, D. C., in dismissing plaintiff's suit because he elected not to avail himself of leave to amend his declaration, when a *condition* of amending was attached *after* the leave was given, unfair to him and against his will.

2d. In affirming the judgment or order of said Supreme Court in refusing to vacate the order and judgment thereof of final dismissal, when plaintiff made proper motion and showing therefor, and in alleging (in its opinion) plaintiff acted without reasonable cause and not in good faith in exercising his option about amending his declaration, in electing not to amend, and also erred in ruling, in opinion, p. 12, Rec., that such practice could not be allowed, although the right to refuse to amend (especially when an ex post facto condition or punishment was attached after the leave) was in effect given by the trial court itself by the very terms of the leave or license, p. 4, Record, top and bottom.

3rd. In affirming judgment of trial court in allowing defendants to set up a claim for costs after unconditional leave had been granted plaintiff to amend, without objection at the time by said defendants, and also erred in ruling, in opinion, p. 12, Rec., that the requirement (after added) to pay costs with any amendment was a positive and independent order, authorized by law, which plaintiff's case could be dismissed for, if he refused to comply with it.

4th. Said Court of Appeals erred in refusing to consider the affidavit in the record, in its opinion herein, p. 12, Rec., when such affidavit, ps. 7 and 8 Rec., showed the facts as to good faith, etc., which are not shown elsewhere, and also erred in ruling or assuming that the declaration of plaintiff was defective and must be amended, p. 12, Rec., notwithstanding it appeared proper, especially in light of facts in evidence (ps. 1, 2 and 7, Rec.), and that the refusal to amend was a juggling with justice, although a condition was imposed after leave given unconditionally to amend, and when such after condition operated as a trap and an imposition on plaintiff.

Wherefore plaintiff prays a reversal of the judgment herein by said Court of Appeals, and a judgment in favor of plaintiff.

ARGUMENTS AND AUTHORITIES.

Sec. 9. The first assignment of error, which see, we submit, is well founded in common sense and law. "*Leave* to amend his declaration as *advised*," as in the orders top and close of p. 4, Rec., is the giving by the court itself of a *license* or *option*, to be used or not as plaintiff should be advised or judge best, and if done, to be done as he should judge best, of course in the limits of reason. By such leave the Court *ordered* nothing, and *directed* nothing, but counsel had to assume the responsibility of managing the *privilege* given. See 15 N. H., cited at end of this section of brief. These positions are all the more forcible when the defendants had an after condition and burden imposed on the "leave" given plaintiff, p. 4, Rec. There was no reason Jackson should cease to claim his house that was injured, except to help his case to a trial. Marg. p. 9, and top p. 8, Rec. And yet the court treats the leave given as a *mandatory* order, about which Jackson had no discretion or choice,

and finally dismisses his suit. Marg. pp. 10 and 15, Rec. That this was fatal error see—

Smith *vs.* Powers, 15 New Hamp. 546, 547, 560 and 561. Encyc. Plead. & Prac., Vol. 1, head "Amendments," p. 640, part 14 and note 11.

Sec. 10. The above complaints about the dismissal of plaintiff's suit are strengthened by the grievance, which consisted in allowing the leave to amend to be burdened with costs after the leave had been requested and granted, and the trial was ended. P. 4, Rec. Jackson might as well *appeal* as pay *such costs.* The condition was gained without his consent and against his will and just interest, as see Marg. ps. 6, 7 and 14, Rec.

This last proceeding operated as a most unjust trap to plaintiff, for had he known that he was to well pay defendants for the privilege of dropping part of his case against them, the leave to amend would not have been taken, but the rulings of the court would have been duly excepted to. As it was, the condition was added after plaintiff took the leave, the jury were discharged, and it was too late to retrace steps and to get a bill of exceptions. Such show the injustice.

Sec. 11. But we very respectfully insist that, as defendants made no demand for costs when plaintiff took leave to amend, that they waived thereby their right to any such condition, and are estopped by their silence at the time from going back afterwards to the occasion, and claiming costs as a proper condition of the leave given. Therefore, when this *ex post facto* punishment was made a condition of amending, plaintiff had a right to elect not to amend.

Smith *vs.* Powers, 15 N. H., as cited above.

Sec. 12. Defendants have no right to complain if there was no jury to direct to return a verdict for them when plaintiff elected not to amend, for such was their fault in

not asking for conditions or costs while the jury was present. And by letting the jury go before asking conditions to be attached to plaintiff's leave to amend, defendants unjustly cut off plaintiff's chance to get a bill of exceptions at the time of the court's ruling for the better preservation of his rights. The fact that plaintiff could or did refuse to amend to the *displeasure* of defendants does not alter the right to so refuse, nor does it alter the fair and natural meaning of words, and we submit courts have no right to distort words to prevent a party from doing what is disagreeable. "Leave to amend—as advised," compels nothing.

To say that the privilege to amend can be abused by repeatedly declining, in a specific case when leave is given, is utterly untenable, for none can amend without leave of a court, and if a court repeatedly allows the privilege, it makes it legal, but the court to blame.

Sec. 13. The leave to amend in this case was given under our local statute adopted from Md., (see Sec. 92, R. S. D. C.,) being act of 1785, Ch. 80, Sec. 4, (Kilty's Laws of Md., Vol. 2, as per date,) which section is as follows:

> "IV. And be it enacted, That the courts of law shall have full power and authority to order and allow amendments to be made in all proceedings whatsoever before verdict, so as to bring the merits of the question between the parties fairly to trial; and if amendment is made after the jury is sworn, a juror shall be withdrawn; and in all cases where amendments are made, the adverse party shall have time allowed him, in the discretion of the court, to prepare to support his case upon the state of the proceeding so amended, and such costs shall be allowed the party against whom such amendment may be made as the court shall think just."

Here will be seen no *compulsion* on courts to impose costs on leaves to amend, and no authority conferred to *punish* a party or to dismiss his case because he elects *not* to amend upon "leave" to do so. The dismissal must have good

ground in something else that is wrong, which the party voluntarily elects not to correct.

Sec. 954, R. S. U. S., will not sustain the lower courts in holding that they had a right to dismiss plaintiff's case because he elected not to amend when defendants had an *after* imposed condition added to the leave to amend.

Sec. 14. This honorable Court has been consistent in construing Sec. 954, R. S. U. S., as leaving amendments in the *discretion* of the trial court, unless there was a gross abuse in exercising the discretion, but our local courts are not consistent about amendments. For in Magruder *vs.* Belt, 7 App. D. C. 303, 313, amendment is stated to be a *right*, and they remanded that case to allow a plaintiff to amend to covenant when he had sued in assumpsit *purposely* to evade a sealed contract. Yet the same court has since said that amendments were in the *discretion* of the lower court, and now in this case they say a party cannot after leave refuse to amend, that it was in bad faith, and also there is no right in courts to refuse costs as a condition. Then where is the *right* in a party, or the *discretion* of the trial court? And leave to amend is repeatedly given in our courts without any costs or conditions, although often against justice, as their records show.

Sec. 15. Suppose a party discovers after leave to amend, that he can supply the necessary evidence or matter which his case at first appeared defective in, has he not a right to elect *not* to amend, and in good faith? In this present suit we expect to find that there was really a written contract about Jackson's occupation of the ground of Elias Travers; otherwise Jackson could not have been allowed to stay there so many years at a nominal rent, but Mr. Travers being dead it has not been found, and Jackson has probably forgotten it.

Sec. 16. Our second assignment of error which, see, is of course largely built upon the same reasoning as our first, for if the court was wrong, in dismissing plaintiff's case, it was

wrong in refusing to vacate that dismissal. So we will respectfully refer to sections 9 to 15 of our brief, without repeating some things, and will also refer to the affidavit (uncontradicted) on ps. 7 and 8, Record, (and to letter in marg. p. 9 of Record), in support of such assignment of error. We also duly appealed from the order refusing to vacate the previous order of dismissal and judgment, as see marg. p. 16, Record, etc.

Sec. 17. Our third assignment of error, which see, has been also partly argued in connection with our first. See sections 10 and 11 of our brief. We submit that in plain common sense, as well as in law, that if a party is present, as in this case, when a privilege is unconditionally given his opponent, without any objection on his part, he thereby waives, as he may well do, any legal right to hamper such privilege for his own advantage, and that he can not therefore, on an afterthought, have a clog imposed on his opponent, and that if he so does, his adversary may refuse in reason and good faith, to exercise the privilege, especially if it be, as was here, really an advantage only to the burthening party.

Sec. 18. And as to the order of the court allowing the amendment, that the party given leave should pay costs, such order, if good at all, was good *only* as a *condition* of the leave asked, as will be seen by the statute cited in Sec. 13 of our brief. There was no authority otherwise whatever for such an imposition. See also Sec. 954, R. S. U. S., last part. And there is no law empowering *punishment* because a party will not comply with the imposition. He can be only gotten at by the irregularities in his case, if any, which he will not correct, and which must be met in a regular and proper mode. We submit, our courts had no foundation to treat the order to pay costs in this case as an independent and positive order, which must be obeyed at all events, like some other but different orders.

Sec. 19. Our fourth assignment of error, which see, con-

cerns, for one thing, the refusal to consider the affidavit as to the trial and other things, made on behalf of plaintiff in trying to set aside the dismissal. See the affidavit on ps. 7 and 8, Record, and the opinion on p. 12, Rec. Now, how in the world was the plaintiff to inform the Court of outside facts pertinent to his complaint, or to refresh the memory of the Court as to a past occurrence, except by a written statement verified by oath? Can a bill of exceptions be had simply for the purpose of refreshing the memory of the trial Court as to what it has done on a previous occasion? We know of no such practice. Bills of exceptions are to make a record, and to show proper objections, for an *appellate* tribunal. We submit that in this present case, the affidavit is properly part of the Record and to *vindicate* the plaintiff, and that without it, the lower Court had no ground to judge of the action of the plaintiff, so as to condemn him. If they knew *nothing* about what transpired in the lower Court, they had no right to *judge* the plaintiff, and to rule against him, no right to assume the declaration of plaintiff, ps. 1, 2 and 7, Rec., was defective, and to charge that the refusal to amend was a juggling with justice, because plaintiff elected not to amend when he was tried to be thrown out of Court by unexpected charges for costs, a trap in the case, and a mode of fighting that had been tried against plaintiff before.

Sec. 20. In justice to our case we beg leave to further show that the primary mistake of the trial Court, and which affected the subsequent proceedings, was in holding that Jackson could not prove the ownership of his house apart from the land, by verbal evidence. Marg., p. 13, Rec. This unfortunately does not appear by a bill of exceptions, because we wished to avoid contention and appealing at the time, so was willing to look over that part of our case, and so took leave to amend. And when the clog of costs was after added, then the jury were gone and no bill of exceptions could be had. But what occurred is sworn to without sworn contradiction. And it seems necessary to dispose of said ruling.

Sec. 21. Jackson's ownership of his house is governed by a well developed head of the law, namely, *License*—meaning a privilege to do or procure or use something on the *real estate* of another.

This head of law is largely treated in Vol. 13, Am. & Eng. Ency. Law, Heading VI, pp. 539–557, where its extensive reach at the present day can be found. The theory on which licenses stand is largely shown in—

Miller *vs.* Auburn and Syracuse Rd. Co., 6 Hill (N. Y.), 64, 65.

Many illustrations of rights to use or remove things from or out of the land of another could be given at the present day. Some instances of rights under parol licenses can be found in—

Am. & Eng. Ency. Law, Vol 13, pp. 550–553 and notes.

Sec. 22. But Jackson's ownership of his house and parol proof of such is amply sustained by the reasoning through the case of—

Rogers *vs.* Cox, 96 Ind. 517–162.

See also Harris *vs.* Gillingham, 6 N. H. 11.

Sec. 23. Jackson's rights might be maintained under the ample head of "Fixtures" as concerns tenants and lessees, and his rights as a vendee are good in equity by—

Purcell *vs.* Miner, 4 Wall. 513.

Sec. 24. Part of the error of the lower court consisted in holding that title to real estate could only be proved in writing. There are many instances in which title is proved by verbal evidence, as in inheritance, escheat, adverse possession, dedication, estoppel, and others.

See Dickerson *vs.* Colgrove, 100 U. S. 583, 584.

Sec. 25. And before a building can be construed to be a part of another man's realty, it must be shown that it is there by his consent as part of his property, and not that he has *agreed*, in words or writing, it shall belong to another and it must be so *attached* to the land as to be reasonably a part thereof. Jackson's house is no part of the lot it is on.

Sec. 26. The court below was itself absurdly inconsistent in holding that Jackson could not prove *his* ownership of the house by parol evidence, because it was real estate and belonged in law to Travers, when the title of *Travers* was only shown by parol evidence, which the court was ruling at the same time could not in law prove title to real estate. See marg. p. 13, R. And why did not the defendants *demur* to the declaration, and in due place?

J. J. WATERS,
Attorney for Plaintiff.

No. 157.

W. F. Mattingly for Def'ts.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,
Clerk.

Filed February 2, 1900.

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 157.

ROBERT JACKSON, PLAINTIFF IN ERROR,

vs.

GEORGE E. EMMONS AND J. PAUL SMITH.

BRIEF FOR DEFENDANTS IN ERROR.

WM. F. MATTINGLY,
Attorney for Defendants.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 157.

ROBERT JACKSON, PLAINTIFF IN ERROR,

vs.

GEORGE E. EMMONS AND J. PAUL SMITH.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was an action of trespass *q. c. f.* brought by the appellant against the appellees to recover damages alleged to have been caused by the blasting of rock.

The plaintiff below, in the course of the trial before the jury, in order to avoid a verdict against him under the direction of the court, asked and obtained leave of the court to withdraw a juror and to continue the case with leave to amend his declaration within twenty days as advised (Rec., pp. 3, 4). This was done under the Act of Maryland of 1785, Ch. 80, Sec. 4, in force in this District, which is as follows:

> "The courts of law shall have full power and authority to order and allow amendments to be made in all proceedings whatsoever before verdict, so as to bring the merits of the question between the parties fairly to trial; and if amendment is made after the jury is sworn, a juror shall be withdrawn; and in all

> cases where amendments are made, the adverse party shall have time allowed him, in the discretion of the court, to prepare to support his case upon the state of the proceeding so amended, *and such costs shall be allowed the party against whom such amendment may be made as the court shall think just.*"
>
> See Abert's Compilation, Ch. 55, Sec. 87, p. 460.

By a subsequent order of the court, passed two days after, plaintiff was required to pay the costs of the term in which a juror was withdrawn and leave given to amend within twenty days from that date (Rec., p. 4).

At the expiration of the twenty days, not having in any way complied with the order of the court, the plaintiff's attorney wrote to defendant's attorney that he had elected not to amend and would stand upon the original declaration (Rec., p. 5).

This letter defendants' attorney annexed to a motion to dismiss (Rec., p. 5), which the court granted (Rec., p. 6), and refused afterwards to vacate same on plaintiff's motion (Rec., p. 8).

From these orders the plaintiff appealed to the Court of Appeals, which affirmed the judgment below.

ARGUMENT.

Had the court power under the circumstances to order the dismissal of this suit? In other words, can a plaintiff, in an action at law, when in the course of the trial it becomes evident that under the rulings of the court a verdict will be directed to be given for the defendant, ask leave of the court to withdraw a juror and amend, which is granted on payment of costs, afterwards say to the court, I won't amend, I won't pay the costs, but I will risk a trial before some other judge on the original declaration. A court with-

out power to prevent such a *quasi* contempt as this, by dismissing the suit, would be without authority which it would seem it ought to possess.

While it is true that at the trial of this case, on the court being satisfied that the plaintiff, on his declaration, could not maintain his suit, it could not order that the plaintiff should be non-suited, yet it could and would have directed a verdict for the defendants.

There are numerous cases in which the court can order a suit to be dismissed. As, for instance, for failure to plead within a designated time; for not complying with order for bill of particulars; for want of prosecution; for not giving security for costs; and for failure to appear either on the regular call of the calendar or at call for trial.

Evans' Practice, 263, states:

> "*Non pros* is an entry made, or supposed to be made by order of the court, in consequence of some contempt of the court, committed by a plaintiff; either by absenting himself from the court when his presence is necessary to the progress of his cause, or by not filing a pleading, finding security for costs, or doing any other act which he has been required by a rule of the court to do."

See Perry, Com. Law Pleading, 219.
6 Enc. Pl. & Pr. 906–909, 919.

Plaintiff's refusal to comply with an order requiring him to separately paragraph his different causes of action, according to the local practice, justifies a dismissal of his case.

58 Fed. Rep. 534; Thompson *vs.* Gatlin.
See 11 Ark. 9; Town *vs.* Evans.
24 Ark. 599; Wiide *vs.* Hart.

> "A judgment of non-suit is only given after the appearance of the defendant, when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he has not fol-

lowed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *nonpros'd*, and is liable to pay the costs."

16 How. 365; Homer *vs.* Brown.

The court having power to dismiss a suit for non-compliance with any order or rule passed against a plaintiff, *in invitum, a fortiori*, would have power to dismiss a suit for non-compliance with an order passed at plaintiff's request in order to avoid a verdict against him.

It is respectfully submitted that the judgment of the in court below should be affirmed.

WM. F. MATTINGLY,
Attorney for Defendants.

JACKSON *v.* EMMONS.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 157. Submitted February 2, 1900. — Decided February 26, 1900.

On motion of the plaintiff made after commencement of the trial of this case, a juror was withdrawn, the remaining jurors were dismissed, and leave was given to the plaintiff to amend his declaration within a time named, and the case was continued for the term. Subsequently, on motion of the defendants' attorney, made after notice to plaintiff, the time within which the amendment could be filed was enlarged, and the plaintiff was ordered to pay the costs of the term in which the juror was withdrawn. The plaintiff declined to pay those costs and the court dismissed the case. *Held* that the trial court erred in so doing, as whatever conditions or rights the defendants were entitled to in consequence of the plaintiff's motion should have been asserted and adjudged when that motion was made.

THE statement of the case will be found in the opinion of the court.

Mr. Joseph J. Waters for plaintiff in error.

Mr. William F. Mattingly for defendants in error.

Opinion of the Court.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is an action for damages. The ground of it is injuries to the wife of the plaintiff in error, and to his house by blasting rock near the latter.

The allegation is that "by such blasting" the defendant "unlawfully and forcibly, with great and dangerous violence, threw large and heavy pieces of said rocky formation from time to time into the premises . . . and near said ground occupied and held by said plaintiff under a yearly ground rent, with other rights and privileges, and against the house and habitation on said premises, which house was and is owned by said plaintiff, and was used and occupied during said period by said plaintiff and his family as a dwelling."

Damages are laid at six thousand dollars.

The defendant's plea is not guilty; and further, that the cause of action did not accrue within three years.

The case came on to trial before a jury, and the record shows that on December 8, 1897, "after a partial hearing of the case, the plaintiff by leave of the court withdraws a juror, and the remaining jurors are discharged from further consideration of the case, with leave to amend his declaration as advised within twenty days, and the case is continued for the term."

Subsequently, on motion of the attorney for the defendants, and after notice to plaintiff, the order limiting plaintiff's time to amend was rescinded, and he was given twenty days from the seventh of January, 1898, to amend his declaration, and was ordered to pay the costs of the term in which the juror was withdrawn.

On the 27th of January the plaintiff served on the defendants' attorney the following notice:

"1225 31ST STREET, *Jan.* 27, 1898.

"WM. F. MATTINGLY, Esq.,

Atty. for Geo. E. Emmons, etc.

"We intended in good faith to change or 'amend' our declaration in the case of Jackson *v.* Emmons and Smith, so

as to avoid unnecessary appeals, but the 'amendment' since made to the leave giving us, (at your request,) compelling us to pay unexpected costs, induces us to elect not to amend now, especially as on further investigation we are confirmed in the opinion that Jackson is the legal owner of the house he complains of as damaged; so please notice that we stand upon our declaration now as originally filed.

"Very respectfully yours,

"J. J. WATERS,

"*Atty. for Robt. Jackson.*"

On March 8, 1898, the defendants gave notice that they would move "the court to dismiss the suit or to take such other action in the premises as may be lawful and proper."

And on the 25th of March the following order was made:

"The plaintiff though granted leave to amend his declaration on the 7th day of January, 1898, within twenty days, and that he pay the costs of the October term, 1897, has not so amended or paid said costs, and it appearing upon the records that the plaintiff declines to so amend, therefore the defendants move the court to dismiss this suit, which is granted; therefore it is considered that the plaintiff take nothing by suit, and that the defendants go thereof without day and recover against the plaintiff their costs of defence, to be taxed by the clerk, and have execution thereof. Penalty of bond on appeal fixed at $50.00."

On March 26, 1898, the plaintiff moved the court to vacate the order of dismissal, and supported it by an affidavit of what had transpired at the trial inducing his action of withdrawing a juror and taking the order to amend his declaration. It is also stated that "Afterwards, before plaintiff's time to amend had expired, defendants moved to compel him to pay costs of the past term, being $19.70, as given by the clerk of the court, as a condition of amending, and affiant wished time to see if his client could comply with this when required by the court, so as to avoid controversy, but, finding his client could not comply in time, as said client is very poor and a colored laborer and that it was not necessary to his

case to amend, affiant elected not to do so, and to avoid misunderstanding so informed defendant's counsel by the letter he exhibits with his motion to dismiss."

The motion to vacate the order dismissing the case was denied, and the plaintiff took an appeal to the Court of Appeals, which affirmed the ruling of the lower court, and this appeal was then taken.

The trial court erred in dismissing the case. If the original order granting leave to amend had been made conditional upon the payment of costs the plaintiff might or might not have accepted it. To decline to amend afterwards upon conditions which were not exacted or even, as far as the records show, were not contemplated, cannot be charged against him as misconduct. Indeed, there is no question of his good faith, and whatever conditions or rights the defendant was entitled to in consequence of the motion should have been asserted and adjudged when the plaintiff's motion was made. If such rights had been asserted the plaintiff would have had a choice of yielding or not yielding to them, which afterwards could not be exercised.

We think, therefore, the judgment of the Court of Appeals should be reversed with costs, and the cause remanded with directions to reverse the judgment of the Supreme Court, and it is so ordered.